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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

ENVIRONMENTAL PROTECTION AGENCY,  
v. *Petitioner,*

STATE OF OKLAHOMA, *et al.,*  
\_\_\_\_\_  
*Respondents.*

STATE OF ARKANSAS, *et al.,*  
v. *Petitioners,*

STATE OF OKLAHOMA, *et al.,*  
\_\_\_\_\_  
*Respondents.*

On Petitions for a Writ of Certiorari to the  
United States Court of Appeals  
for the Tenth Circuit

\_\_\_\_\_  
**BRIEF OF THE STATES OF COLORADO,  
NEVADA, NORTH DAKOTA, PENNSYLVANIA  
AND SOUTH DAKOTA  
AS AMICI CURIAE IN SUPPORT OF PETITIONERS**  
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GALE A. NORTON  
Attorney General  
State of Colorado  
110 Sixteenth Street  
10th Floor  
Denver, Colorado 80202

March 11, 1991

NICHOLAS J. SPAETH  
Attorney General  
(Counsel of Record)  
State of North Dakota  
State Office Building  
900 East Boulevard  
Bismarck, North Dakota 58505  
(701) 224-3640

(Additional Counsel Listed on Inside Front Cover)

FRANKIE SUE DEL PAPA  
Attorney General  
State of Nevada  
Heroes Memorial Building  
Capitol Complex  
Carson City, Nevada 89710

MARK BARNETT  
Attorney General  
State of South Dakota  
500 East Capitol  
Pierre, South Dakota  
57501-5070

ERNEST D. PREATE, JR.  
Attorney General  
State of Pennsylvania  
16th Floor  
Strawberry Square  
Harrisburg, Pennsylvania 17120

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AND SOUTH DAKOTA  
AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

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The States of Colorado, Nevada, North Dakota, Pennsylvania and South Dakota submit this brief as *amici curiae* in support of the petitions by the U.S. Environmental Protection Agency ("EPA") and the State of Arkansas, *et al.*, for a writ of certiorari to re—



view the decision of the United States Court of Appeals for the Tenth Circuit in *Oklahoma v. EPA*, 908 F.2d 595 (10th Cir. 1990).<sup>1</sup>

### INTEREST OF THE AMICI CURIAE

This case presents two issues that are central to the regulation of water quality on interstate waterways. The Amici States have a vital interest in both of these issues because the vast majority of the streams and rivers running through the Amici States are interstate in character. At one point or another, virtually all of the major rivers in these states cross a state boundary. In addition, the streams and lesser rivers feeding these waterways often originate in other states, and in turn, the streams and rivers in the Amici States are tributaries for the rivers of downstream states. Thus, the states submitting this brief have both upstream and downstream concerns about the regulation of their waterways.

The Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, now serves as the primary source of authority for regulating water quality on these waterways. In conjunction with the provisions of that Act, each state establishes water quality standards for the waters within that state. CWA § 303, 33 U.S.C. § 1313. Any "point source" that intends to discharge effluent into those waters must obtain a permit under the Act's National Pollutant Discharge Elimination System ("NPDES"). CWA § 402, 33 U.S.C. § 1342. One condition for receiving these permits is that the discharge must meet the technology-based effluent limitations set by EPA. CWA § 301, 33 U.S.C. § 1311. Another condition is that the discharge must comply with the water quality standards set by the source state. CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).

<sup>1</sup> Pursuant to Supreme Court Rule 37.5, this brief is submitted on behalf of the Amici States by their respective Attorneys General and does not require the consent of the parties.

The first issue presented by the Tenth Circuit's decision is whether facilities that discharge into interstate waterways must also comply with the standards set by downstream states, which can vary significantly from the source state's standards. The second issue presented is whether pre-existing violations of any relevant water quality standard, on any downstream segment of an interstate or intrastate waterway, preclude granting new permits. Both of these issues obviously have a critical effect on the ability of countless facilities across the nation to obtain NPDES permits.

Although many states are reluctant to create the appearance of taking sides in litigation between two other states,<sup>2</sup> there is an overriding need for a definitive and nationwide resolution of the issues presented by the Tenth Circuit's decision. The facilities affected by these issues include the wastewater treatment plants owned or operated by nearly every major municipality and by other public agencies, as well as facilities owned by the states themselves. They also include all new industrial facilities locating in these states and existing businesses that are expanding their operations. Indeed, to the extent the Tenth Circuit's decision applies to permit renewals, all publicly and privately owned sources (over 75,000 facilities) would be affected as their NPDES permits come up for renewal during the next five years.

In addition to the impact on publicly owned facilities and future economic growth, this case will affect the regulatory responsibilities of all states that have received permitting authority under the CWA. Nearly forty states now have established programs for issuing NPDES permits to sources within their jurisdiction and have been delegated NPDES permitting authority by EPA. CWA

<sup>2</sup> In addition to the usual considerations of comity, virtually all states are exposed in some manner to interstate controversies regarding their waterways, and taking an official position in other litigation creates yet another risk of inflaming those disputes.

§ 402(b), 33 U.S.C. § 1342(b). Agencies in these states therefore are responsible for reviewing permit applications, identifying the standards which must be met, and analyzing the data to assess compliance with the applicable standards. Moreover, these state agencies must conduct the hearings on contested applications and must assure EPA that they are accounting properly for the standards of neighboring states. To place the magnitude of these programs in perspective, historic data for the nation as a whole suggest that states now managing their own permit programs will process at least 10,000 new and renewal permit applications each year. The issues decided by the Tenth Circuit will affect virtually all aspects of these permitting programs, from the identification of the applicable standards, to the data and hearings required, to the final outcome.

Finally, all states have an extraordinary interest in obtaining a definitive and immediate resolution of these issues *before* the Tenth Circuit's decision causes any further disruption and interstate controversies. The conflict that now exists over the applicability of downstream state standards in the CWA permitting process threatens to disrupt ongoing proceedings and negotiations among the states, as well as to generate new disputes and years of expensive litigation. Moreover, the confusion about the applicable standards and legal effect of pre-existing violations casts intolerable doubt on the ability to obtain permits for projects that are now under construction or in the planning stages. States and municipalities simply cannot afford to have this uncertainty jeopardize the enormous public investment required for building new treatment facilities or discourage private investment that will create new jobs and opportunities.

The Amici States therefore respectfully request this Court to grant certiorari in this case, to resolve the issues presented by the Tenth Circuit's decision and the petitions, and to clarify the law controlling the interstate regulation of water quality under the CWA.

## STATEMENT

The Tenth Circuit's decision arose in the context of reviewing a discharge permit issued by EPA to a new municipal sewage treatment plant in Fayetteville, Arkansas. Half of the effluent from that facility's proposed split-flow discharge would flow into a river that crosses into the State of Oklahoma forty miles downstream from the point of discharge. EPA approved the proposed permit based on a finding that the effluent discharged by the facility would fully comply with the federally-approved water quality standards of Arkansas and would have no adverse impact on the water quality of Oklahoma. In overturning EPA's approval of the proposed discharge, the court based its decision on two key legal holdings.

First, the Tenth Circuit held that the Clean Water Act requires an upstream facility to comply with the water quality standards of a downstream state, in addition to the standards of the source state. 908 F.2d at 615. Moreover, under the court's view, the permitting agency (here EPA) is afforded no flexibility in interpreting or applying the water quality standards of a downstream state when considering a permit application. As a result of this approach, the Tenth Circuit specifically rejected EPA's exception that would have allowed the issuance of permits for upstream sources that will have no detectable impact on the water quality of a downstream state. *Id.* at 632 n.53.

Second, the court concluded that an existing violation of a water quality standard triggers a mandatory ban on new permits for upstream facilities. *Id.* at 616. This permit ban would apply to any new upstream facility that proposed to discharge effluent of the type responsible for a downstream violation, provided that *some* amount of the effluent, even if undetectable, would reach the downstream segment. *Id.* at 632.

Applying these two holdings, the Tenth Circuit found that there was a pre-existing violation of water quality



standards in the Oklahoma portion of the waterway into which the effluent from the Fayetteville facility would eventually flow. Under the court's first holding, the Oklahoma standard that is being violated must be applied strictly to Arkansas sources. Under the second holding, EPA was required to deny a permit to the Fayetteville facility because of the ongoing violation. *Id.* at 634.

## REASONS FOR GRANTING THE WRIT

### I. ALL STATES NEED CLEAR GUIDANCE REGARDING THE APPLICABILITY OF DOWNSTREAM STATE WATER QUALITY STANDARDS IN NPDES PERMITTING DECISIONS.

The issue of whether a downstream state's water quality standards apply to out-of-state sources is critical to the administration of the CWA and the efficient resolution and avoidance of interstate water quality disputes. Prior to the Tenth Circuit's decision, permitting agencies normally based permit approvals on a facility's compliance with the water quality standards of the *source* state. This approach was consistent with a series of decisions by this Court and lower courts regarding the applicability of downstream state standards. The Tenth Circuit's decision now to require a contrary approach creates intolerable confusion and the risk of inconsistent outcomes in different regions of the country. Thus, plenary review is necessary to resolve the conflict over this important issue.

In particular, a series of decisions by this Court have supported development of the current approach by giving primary importance to the laws and standards of the source state. *See, e.g., City of Milwaukee v. Illinois*, 451 U.S. 304 (1981); *International Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987). The consistent theme of these decisions is that only the source state, and not a downstream state, can regulate point sources under either its common law or water quality standards adopted pursuant to state statutes and the CWA. For example, this Court

concluded in *Ouellette* that "the CWA precludes a court from applying the law of an affected State against an out-of-state source" and that the CWA preempted application of a downstream state's common law. 479 U.S. at 494.

The decisions of other federal and state courts during the past decade have also contributed to this understanding of the law and of the approach required by the CWA. *See, e.g., Illinois v. City of Milwaukee*, 731 F.2d 403, 412-14 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985); *Tennessee v. Champion Int'l Corp.*, 709 S.W.2d 569, 576 (Tenn. 1986), *remanded*, 479 U.S. 1061 (1987).<sup>3</sup> These decisions have all adopted the principle that a source state and EPA have primary regulatory authority over point source discharges. The standards of a downstream state are not directly applicable to an out-of-state source, according to the decisions of these courts.

In addition, Congress reviewed this issue in 1987 and decided against amending the statute to give the standards of downstream states a different role in out-of-state permitting decisions. Specifically, Congress considered amending the Act, in the context of the most recent CWA reauthorization legislation,<sup>4</sup> to *require* EPA to veto a permit that would result in a *substantial* violation of a downstream state's water quality standards.<sup>5</sup> However, Congress ultimately decided *not* to change the Act in this regard, and instead affirmed the traditional understanding of the law. The sponsors of the bills in both the

<sup>3</sup> *See also National Wildlife Federation v. Federal Energy Regulatory Commission*, 912 F.2d 1471, 1483-84 (D.C. Cir. 1990); *Champion International Corp. v. EPA*, 652 F. Supp. 1398 (W.D.N.C. 1987), *rev'd on other grounds*, 850 F.2d 182 (4th Cir. 1988).

<sup>4</sup> Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987).

<sup>5</sup> S. 1128, 99th Cong., 1st Sess. § 117 (1985), *reprinted in* 2 Senate Comm. on Env't & Public Works, 100th Cong., 2d Sess., *Legislative History of the Water Quality Act of 1987*, at 1546, 1603-05 (1988) [hereinafter *Leg. His.*].

House and Senate relied heavily on the following language to explain this understanding of the Act's meaning:

Where two or more states, sharing a common water body, have plans approved by EPA with differing standards of water quality, the Act does provide mechanisms for resolving inter-state conflicts. However, there is nothing in the existing Act or in the proposed amendments which gives EPA the power to force one state to changes [sic] its approved water quality standards or those valid activities done in accordance with its plan in order to accommodate the water quality needs of another state or states.<sup>6</sup>

This interpretation of the Clean Water Act has thus become the underpinning both for state permit programs and for planning by states, municipalities and private industry. Accordingly, new facilities have been constructed and existing facilities retrofitted to meet the water quality standards of the source state. State permitting agencies have focussed their permit programs on ensuring that permit applicants comply with the water quality standards of the source state. Moreover, there has been no need for either state regulators or permit applicants to account for the water quality standards adopted by downstream states, to gather data on conditions in those states, or to conduct modelling and change the design of facilities in light of downstream state standards.

The Tenth Circuit's decision to adopt a contrary interpretation of the CWA, however, creates tremendous uncertainty and could require dramatic changes by states and permit applicants. Unless this Court grants review to settle the conflict that now exists, permitting states will lack clear guidance on the weight they should give to the recommendations of downstream states. Downstream states will be uncertain about their rights to ob-

<sup>6</sup> House Debate on H.R. 1, Jan. 8, 1987, reprinted in 1 Leg. His. at 551; Senate Debate on H.R. 1, Jan. 14, 20 & 21, 1987, reprinted in 1 Leg. His. at 395.

ject to out-of-state permits. Different states are likely to take different approaches, depending on their own interests and interpretation of the confused tangle of case law, and the uncertainty and inconsistencies that result will exacerbate and provoke even more water quality disputes between states.<sup>7</sup>

Private and public facilities will also face disruptive uncertainties. Existing facilities that were permitted based on compliance with the standards of the source state will have no assurance that the same standards will apply when their permit comes up for renewal. The planning for new facilities will be disrupted even more severely by the uncertainties about applicable standards.

The Tenth Circuit's decision has removed the consensus that previously existed about the applicability of downstream state standards. There is no longer a clear answer to this question that can guide states and permit applicants. The uncertainty and confusion created by the Tenth Circuit's decision and the conflicting interpretations of the CWA must be resolved by this Court.

## II. THE TENTH CIRCUIT'S IMPOSITION OF A SWEEPING PERMIT BAN UNDERMINES THE RESPONSIBILITY OF STATES AND THREATENS TO CAUSE WIDESPREAD DISRUPTION.

The Tenth Circuit's second holding requiring a ban on new discharges upstream from a relevant water quality violation also represents a major departure from the current implementation of the CWA. The Tenth Circuit itself admitted that its holding requiring a permit ban

<sup>7</sup> The situation will be further complicated by the 1987 amendment to the CWA that authorizes EPA to treat Indian tribes as states under the Act. CWA § 518(e), 33 U.S.C. § 1377(e). Under the Tenth Circuit's first holding, all discharges upstream from an Indian tribe with approved water quality standards would now be required to comply with those standards. Furthermore, under the Tenth Circuit's second holding, an existing violation of an Indian tribe's standards would require a ban on new upstream permits.



"lacks an explicit imprimatur" in the CWA. 908 F.2d at 633. Nevertheless, based on its own view of the purpose of the CWA, the court imposed a rigid and inflexible permit ban requirement on the states.

As demonstrated by the application of this rule in the instant case, the Tenth Circuit's holding prohibits even new discharges that would have no detectable effect on downstream water quality and therefore would not cause or contribute to any violation of water quality standards. 908 F.2d at 632. The Tenth Circuit's decision would similarly preclude issuance of a permit for a new discharge that was accompanied by an equivalent reduction of loads from other sources. *See id.* at 628 n.48. In these and other circumstances, the Tenth Circuit's decision goes far beyond current practice and would impose substantial new restrictions on a state's ability to issue new permits.

The Amici States are strongly committed to the goals of improving water quality and ameliorating existing violations of water quality standards. However, by imposing a rigid, sweeping permit ban on the states and EPA, the Tenth Circuit has deprived states of all flexibility to reduce water quality violations in the most equitable and least disruptive manner possible. For example, instead of allocating responsibility for reducing pollutant loading fairly among existing and new dischargers, the Tenth Circuit's decision requires states to impose an immediate and absolute ban on new sources upstream from any violation of a relevant water quality standard.

No other court has ever suggested that an existing water quality violation mandates the absolute ban on new permits required by the Tenth Circuit's decision. Thus, the Tenth Circuit's holding appears to be devoid of any legal or precedential support, yet it stands as the only definitive determination to date by a federal court on the significance of existing water quality violations under the CWA.

Compliance with the Tenth Circuit's decision will have drastic consequences for many regions of the country.<sup>8</sup> Unfortunately, a substantial proportion of the nation's waterways currently fail to meet water quality standards,<sup>9</sup> and therefore the Tenth Circuit's decision will require states to deny permits to large numbers of new facilities that propose to discharge effluent upstream from an existing water quality violation. Many new facilities that would have little or no adverse impact on water quality will be unable to obtain discharge permits. Economic and industrial development would likely be stifled in many regions of the nation.

Finally, the Tenth Circuit's decision will impose an impossible administrative burden on permitting agencies and publicly owned facilities in the states. For the first time, agencies and applicants will be required to assess water quality compliance on *all* stream miles and lakes within their borders. This will be an enormous and expensive undertaking, because the monitoring of water quality is a very laborious and resource-intensive activity. According to the most recent EPA statistics, water quality assessments are only available for twenty-nine percent of stream miles and forty-one percent of lake acres in the nation.<sup>10</sup> The states will therefore be required to bear tremendous burdens in assessing water quality on all downstream waterways before issuing new discharge permits.

Given the fundamental importance of the Tenth Circuit's holding, and the extremely difficult position that all

<sup>8</sup> Any state that fails to comply with the Tenth Circuit's decision may jeopardize its permitting authority and risk substantial delays and controversy in its permitting program as opponents of new permits use the Tenth Circuit's decision to contest permit approvals before the agency and the courts.

<sup>9</sup> EPA, *National Water Quality Inventory, 1988 Report to Congress*, at 1 (EPA 440-4-90-003, April 1990).

<sup>10</sup> *Id.*

states will be placed in by that court's decision, it is imperative that this Court grant certiorari and provide clear guidance on the significance of existing water quality violations under the CWA.

### CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to review the decision of the Tenth Circuit.

Respectfully submitted,

GALE A. NORTON  
Attorney General  
State of Colorado  
110 Sixteenth Street  
10th Floor  
Denver, Colorado 80202

FRANKIE SUE DEL PAPA  
Attorney General  
State of Nevada  
Heroes Memorial Building  
Capitol Complex  
Carson City, Nevada 89710

MARK BARNETT  
Attorney General  
State of South Dakota  
500 East Capitol  
Pierre, South Dakota  
57501-5070

NICHOLAS J. SPAETH  
Attorney General  
(Counsel of Record)  
State of North Dakota  
State Office Building  
900 East Boulevard  
Bismarck, North Dakota 58505  
(701) 224-3640

ERNEST D. PREATE, JR.  
Attorney General  
State of Pennsylvania  
16th Floor  
Strawberry Square  
Harrisburg, Pennsylvania 17120

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